KATHERINE POOLE (SBN 195010)
DOUGLAS ANDREW OBEGI (SBN 246127)
NATURAL RESOURCES DEFENSE COUNCIL
111 Sutter Street, 20th Floor
San Francisco, CA 94104
Telephone: (415) 875-6100
Facsimile: (415) 875-6161
kpoole@nrdc.org; dobegi@nrdc.org

Attorneys for Plaintiff NRDC

HAMILTON CANDEE (SBN 111376)
BARBARA JANE CHISHOLM (SBN 224656)
TONY LOPRESTI (SBN 289269)
ALTSHULER BERZON LLP
177 Post St., Suite 300
San Francisco, CA 94108
Telephone: (415) 421-7151
Facsimile: (415) 362-8064
hcandee@altber.com; bchisholm@altber.com; tlopresti@altber.com

Attorneys for Plaintiff NRDC

TRENT W. ORR (SBN 77656)
EARTHJUSTICE
50 California St. Suite 500
San Francisco, CA 94111
Telephone: (415) 217-2000
Facsimile: (415) 217-2040
torr@earthjustice.org

Attorneys for Plaintiffs and proposed Plaintiffs

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

NATURAL RESOURCES DEFENSE COUNCIL, *et al.*,

Plaintiffs,

v.

SALLY JEWELL, U.S. Department of the Interior, *et al.*,

Defendants.

SAN LUIS & DELTA MENDOTA WATER AUTHORITY, *et al.*,

Defendants-Intervenors.

Case No. 1:05-cv-01207 LJO-EPG

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' AMENDED MOTION FOR LEAVE TO FILE A FOURTH SUPPLEMENTAL COMPLAINT

Date: March 16, 2016
Time: 8:30 a.m.
Ctrm: 4
Judge: Lawrence J. O'Neill

ANDERSON-COTTONWOOD IRRIGATION DISTRICT, *et al.*,

Joined Parties.

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INTRODUCTION

Plaintiffs seek the Court's leave to supplement their complaint against the U.S. Bureau of Reclamation ("Reclamation") and the Sacramento River Settlement ("SRS") Contractors to address ongoing violations of the Endangered Species Act ("ESA") that imperil the survival and recovery of two salmon species indigenous to the Sacramento River and its tributaries. Additionally, Plaintiffs seek to add a claim against the U.S. Fish and Wildlife Service ("FWS"), for issuing an invalid consultation on the effects that the SRS and Delta-Mendota Canal Unit ("DMC") contract renewals have on the delta smelt and its critical habitat. Under the Federal Rules of Civil Procedure, parties may supplement pleadings "to promote as complete an adjudication of the dispute between the parties as possible by allowing the addition of claims which arise after the initial pleadings are filed." *William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co.*, 668 F.2d 1014, 1057 (9th Cir. 1982); Fed. R. Civ. Proc. 15(d). Recent developments in this litigation and in the implementation of the SRS contracts give rise to Plaintiffs' proposed claims. The filing of the Proposed Fourth Supplemental Complaint ("4SC") will promote a comprehensive resolution of the disputes surrounding the contract renewals and avoid wasteful and inefficient litigation of related matters in separate, duplicative cases.

On June 15, 2015, the Court stayed this litigation to allow Reclamation to reinitiate consultation on the SRS and DMC contract renewals at issue in this case. In Reclamation's subsequent request to FWS, Reclamation requested FWS's concurrence that the impacts of the contract renewals on delta smelt were assessed in the 2008 Biological Opinion on the Long-Term Central Valley Project Operations Criteria and Plan ("2008 FWS OCAP BiOp"). Reclamation did not, however, request reinitiation with the National Marine Fisheries Service ("NMFS") on the impacts of the same contract renewals on the endangered Sacramento River winter-run Chinook salmon ("winter-run Chinook") and the threatened Central Valley spring-run Chinook salmon ("spring-run Chinook"), even though such reinitiation is required under Section 7(a)(2) of the Endangered Species Act of 1973 ("ESA"), 16 U.S.C. §1536(a)(2), and the ESA's implementing regulations, 50 C.F.R. §402.16. Plaintiffs thus seek to add a claim to require Reclamation to reinitiate consultation with NMFS on the impacts of the SRS contract renewals to the winter-run and spring-run Chinook and its critical habitat.

Plaintiffs also seek to add a related claim challenging Reclamation's and the SRS Contractors' ongoing violations of Section 9 of the ESA, 16 U.S.C. §1538, for illegal "take" of winter-run and spring-run Chinook that has occurred each of the last two years as a result of implementation of the renewed SRS contracts. In 2014, Reclamation made excessive deliveries to the SRS Contractors that depleted the cold water reserves in Shasta Reservoir, causing temperature increases fatal to the winter-run and spring-run Chinook during the species' spawning, egg incubation, and rearing periods. These deliveries, and the SRS Contractors' diversions, led to the near-total loss of the entire generation of winter-run and spring-run Chinook that hatched, or would have hatched, in the Sacramento River below Shasta Dam in the 2014 "brood year." In 2015, in spite of Reclamation's assurances that it would better manage releases to protect listed salmonids, Reclamation again made excessive deliveries to satisfy the SRS contracts, causing another year of fatal temperature increases. Recent data shows that the impacts to the 2015 brood year are even worse than in 2014, and that loss of a second consecutive generation of the species is almost certain. Salmonids generally live three years, spawning just once, so the loss of a third generation in 2016 could cause the extinction of the species in the wild. Because neither Reclamation nor the SRS Contractors have authorization to take listed salmonids pursuant to SRS contract deliveries, Plaintiffs seek to add a claim alleging that they violated ESA Section 9.

Last, Plaintiffs seek to add a claim under the Administrative Procedure Act ("APA"), 5 U.S.C. §§701, 706, challenging FWS's inadequate consultation on the effects of the SRS and DMC contract renewals on delta smelt. On December 14, 2015, FWS sent a letter to Reclamation concurring with Reclamation's conclusion that "all of the possible effects to delta smelt and its critical habitat by operating the CVP to deliver water under the SRS and DMC contracts were addressed in the [2008 FWS OCAP BiOp]" ("2015 Letter of Concurrence" or "2015 LOC"). Doc. 993-1 at 4. Even though the Court stayed this litigation to "allow the agencies to revisit whether approval of the [SRS and DMC] Contracts comports with the ESA in light of the most up-to-date information," Doc. 979 at 12,[1]

[1] All pincites to docket entries use CM/ECF pagination, not the documents' internal pagination.

FWS only considered whether the 2008 FWS OCAP BiOp analyzed the effects of the SRS and DMC contracts – a question that a Ninth Circuit en banc panel has already answered in the negative. *Natural Res. Def. Council ("NRDC") v. Jewell*, 749 F.3d 776, 782 (9th Cir. 2014) (en banc) (holding that the 2008 FWS OCAP BiOp "merely assesses the general effects of the [OCAP]," and did not address the "Bureau's decision to renew the specific contracts"). FWS's exclusive reliance on the 2008 FWS OCAP BiOp is fundamentally flawed. First, FWS failed to analyze the entire agency action because the 2008 FWS OCAP BiOp only addressed the effects of system operations through 2030, while the SRS contract renewals do not expire until 2045. Second, the 2008 FWS OCAP BiOp did not include analysis of the effects of the specific terms of the contract renewals. Third, FWS assumed in the 2008 FWS OCAP BiOp that species-protective flow requirements and export limits would remain intact, an assumption that is now unreasonable in light of repeated waivers of those requirements in 2014 and 2015. In addition to FWS's unreasonable reliance on the 2008 FWS OCAP BiOp, FWS also failed in the 2015 LOC to update its analysis to reflect the best scientific data available. Finally, FWS's 2015 LOC impermissibly postpones a full analysis of the effects of the SRS contracts on delta smelt, and unreasonably assumes that "if increased outflows are needed" to meet the conservation and recovery requirements of the ESA, Article 7(b) of the SRS contracts allows Reclamation to take species-protective measures that may limit the water available to the SRS Contractors, directly contradicting Reclamation's own assertions that it has no discretion to "alter the quantities . . . of SRS diversions." Decl. of Katherine S. Poole ("Poole Decl.") Ex. 2B at 10.

The proposed claims are inextricably intertwined with the existing claims in this litigation. The most efficient path to a complete disposition of the dispute over the contracts is to allow Plaintiffs to file the 4SC.

BACKGROUND

I. Status of the Litigation

Plaintiffs originally filed this lawsuit to challenge Reclamation's deficient consultation with FWS on the Long-Term Central Valley Project "Operations Criteria and Plan" ("OCAP"), which guides the coordinated operation of the Central Valley Project ("CVP") and State Water Project ("SWP"). *NRDC v. Kempthorne*, No. 1:05-1207, 2008 WL 5054115 ("*Kempthorne*"), at *1 (E.D. Cal.

Nov. 19, 2008) (Doc. 761). Reclamation intended that the OCAP would inform Reclamation's renewals of CVP water contracts that were expiring, including the renewals of the SRS and DMC contracts at issue. *Id.* at *5.

FWS issued a biological opinion on the OCAP's impacts to the delta smelt on July 30, 2004, and then issued a revised biological opinion on February 16, 2005 ("2005 FWS OCAP BiOp"), which superseded the prior biological opinion. *Kempthorne*, 506 F.Supp.2d 322, 333 (E.D. Cal. 2007) (Doc. 323). Both BiOps concluded that the OCAP would *not* cause jeopardy to the delta smelt nor adversely modify its critical habitat. *Id.* In 2005, FWS sent several "letters of concurrence," which relied exclusively upon the data and analysis in the FWS's BiOps, concluding that the SRS and DMC contract renewals would not jeopardize the delta smelt. SAR[2] 3340 (covering 138 SRS contracts); SAR 1660-97 (Natomas Cent. Mut. Water Co.); SAR 289-331 (City of Redding); SAR 1-44 (Anderson-Cottonwood Irr. Dist.); SAR 1277-80 (covering DMC contracts).

Plaintiffs challenged the 2005 FWS OCAP BiOp and actions taken in reliance upon it, including the renewal of the SRS and DMC contracts. Pls.' First Supp. Compl. (May 20, 2005) (Doc. 40-1). In 2007, the Court[3] invalidated the 2005 FWS OCAP BiOp on numerous grounds and ordered FWS to complete a new biological opinion. *Kempthorne*, 506 F.Supp.2d at 387-88; *Kempthorne*, No. 1:05-1207, 2007 WL 4462391, at *1 (E.D. Cal. Decl. 14, 2007) (Doc. 560). The Court determined, however, that it could not grant Plaintiffs' requested injunctive relief as to the contract renewals because some contractors were not parties. *Kempthorne*, 539 F.Supp.2d 1155 (E.D. Cal. 2008) (Doc. 567). The Court directed Plaintiffs to file the operative Third Supplemental Complaint, which joined thirty-four additional high volume contractors as defendants. *Id.* at 1191-92; Doc. 575.

Plaintiffs subsequently moved for summary judgment on their claim that Reclamation violated Section 7(a)(2) of the ESA, 16 U.S.C. §1536(a)(2), by executing the contract renewals based on

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[2] Cites to "SAR" refer to the supplemental administrative record, lodged with the Court on June 6, 2008. Doc. 657.

[3] During earlier district court proceedings in this case, Judge Oliver W. Wanger issued numerous rulings, many of which are referenced throughout this brief as rulings of the "Court." After Judge Wanger's retirement in September 2011, the case was reassigned to Judge Lawrence J. O'Neill.

FWS's invalid consultation. Docs. 680-81. The Court did not rule on the merits of the motion, however, because it determined that Plaintiffs lacked standing to challenge the DMC contracts, *Kempthorne*, 2008 WL 5054115, at *40, and that the ESA's consultation requirement did not apply to Reclamation's renewal of the SRS contracts because the original contracts left Reclamation without sufficient discretion to negotiate new terms that would benefit the delta smelt. *Kempthorne*, 621 F.Supp.2d 954, 1000-01 (E.D. Cal. 2009) (Doc. 834).

On appeal, after a divided three-judge panel of the Ninth Circuit affirmed the Court's threshold rulings, *NRDC v. Salazar*, 686 F.3d 1092 (9th Cir. 2012), a unanimous en banc panel reversed. *Jewell*, 749 F.3d 776. The panel first rejected Defendants' argument that the 2008 FWS OCAP BiOp mooted Plaintiffs claims. *Id.* at 783. The panel explained that "the [2008 FWS OCAP BiOp] merely assesses the general effects of the Bureau's Plan," and did not address the specific contract renewals at issue. *Id.* Next, the panel ruled that Plaintiffs have standing to challenge the DMC contracts because "adequate consultation and renegotiation could lead to . . . revisions" that would benefit the delta smelt. *Id.* at 784. The Court also rejected the conclusion that Reclamation lacks discretion to renegotiate terms more protective of the delta smelt. *Id.* at 783-85. The panel explained "nothing in the original Settlement contracts requires the Bureau to renew the Settlement contracts" and, because "'Delta water diversions' are the most significant 'synergistic cause[]' of the decline in delta smelt," a decision not to renew the SRS contracts could benefit the delta smelt. *Id.* at 785 (quoting 58 Fed. Reg. 12854-01, 12,859 (Mar. 5, 1993)). While the panel held that the original contracts do not require renewal, it declined to decide "whether other legal obligations may compel [Reclamation] to execute renewal contracts." *Id.* at 785 n.1. Instead, the panel explained that, even were Reclamation obligated to renew the SRS contracts, Reclamation retained discretion that required ESA consultation because "[Reclamation] could benefit the delta smelt by renegotiating the Settlement contracts' terms with regard to, *inter alia*, their pricing scheme or the timing of water distribution." *Id.* at 785.

On remand, the Defendants moved to stay the litigation to allow Reclamation to reinitiate consultation under 50 C.F.R. §402.16. Doc. 955, 962. The Court granted the motion and stayed the case until December 15, 2015. Subsequent to the Court's stay decision, Plaintiffs learned that Reclamation had requested reinitiation with FWS regarding the effects of the contracts on delta smelt,

but not with NMFS on the impacts to winter-run and spring-run Chinook. Poole Decl. ¶7. Plaintiffs requested that Reclamation expand its reinitiated consultation to include both agencies. *Id.* Reclamation, however, declined to do so. *Id.* ¶8.

Reclamation did not submit a new Biological Assessment ("BA") with its request for reinitiation. Instead, it relied on and supplemented its 2003 BA on the contract renewals. *Id.* ¶¶3-4 & Exs. 2A-2F, 3. In one of the supplemental documents it submitted, Reclamation effectively denied that it has any discretion to modify the contracts to benefit the delta smelt or its critical habitat. *Id.* Ex. 2B at 10-11. This position directly contradicts the en banc panel's holding that Reclamation retained some discretion when renewing the contracts to act in a manner that would benefit the delta smelt. *Jewell*, 749 F.3d at 785. For example, in spite of the en banc panel's ruling that Reclamation has discretion to alter the "timing of water distribution" to the SRS Contractors, *id.*, Reclamation claimed that it does not have discretion to "alter the . . . timing of SRS diversions from those set forth in the initial SRS contracts." Poole Decl. Ex. 2B at 10. And, in spite of the en banc panel's ruling that Reclamation has discretion to change the contracts' "pricing scheme" to benefit the delta smelt, Reclamation claimed that it "lacks discretion to set pricing terms in the SRS contracts for the sole purpose of protecting delta smelt." *Id.* at 11.

On October 20, 2015, NRDC sent a letter informing FWS that Reclamation's assertions regarding discretion ran afoul of the en banc panel's ruling, and explaining other deficiencies in the reinitiation package. Poole Decl. ¶5 & Ex. 4. On October 28, 2015, NRDC alerted FWS of new environmental documents issued by Reclamation on October 26, 2015, demonstrating Reclamation's exercise of the very discretion that it denied it had in its correspondence with FWS: to modify the timing of deliveries under the SRS contracts. *Id.* ¶6 & Ex. 5. Specifically, Reclamation authorized the modification of terms related to timing in the SRS contracts to allow for the extended use of diverted water. *Id.* Ex. 5.

Subsequently, Reclamation sent letters to FWS in response to NRDC's comments, providing additional information. Poole Decl. ¶10 & Ex. 8. In its December 11, 2015 letter, Reclamation falsely declared that "there is no dispute that the effects of delivering water under the terms of the renewed contracts were addressed through the [2008 FWS OCAP BiOp]." *Id.* Ex. 8 at 2. Reclamation stated

that it only sought "the Service's concurrence that the potential effects of the renewed SRS contracts and DMC contracts are 'adequately covered' in the analysis of the [2008 FWS OCAP BiOp]," *id.* at 1, and suggested that FWS need not consult on changes in the "status of the delta smelt." *Id.* at 2-3.

On December 14, 2015, FWS sent a letter to Reclamation concurring with Reclamation's conclusion that "all of the possible effects to delta smelt and its critical habitat by operating the CVP to deliver water under the SRS and DMC contracts were addressed in the [2008 FWS OCAP BiOp]." Doc. 993-1 at 4. FWS relied exclusively in the 2015 LOC on the analysis in the 2008 FWS OCAP BiOp. FWS did not incorporate any data that post-dates the 2008 FWS OCAP BiOp into its analysis.

II. Plaintiffs' Proposed Fourth Supplemental Complaint

A. Plaintiffs' Claim Against Reclamation for Failure to Reinitiate Consultation with NMFS[4]

The 4SC alleges that Reclamation violated ESA Section 7(a)(2), 16 U.S.C. §1536(a)(2), and the ESA's implementing regulations, 50 C.F.R. §402.16, by failing to reinitiate consultation with NMFS regarding the impacts of the SRS contract renewals on listed winter-run and spring-run Chinook. 4SC ¶¶147-53, 183-88. The ESA requires an action agency, such as Reclamation, to reinitiate Section 7(a)(2) consultation if the agency has "discretionary Federal involvement or control over the action" at issue, and a triggering event occurs, including "[i]f new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered." 50 C.F.R. §402.16(b).

The 4SC alleges that Reclamation failed to reinitiate consultation with NMFS on the effects of the renewed SRS contracts after NMFS replaced a no-jeopardy biological opinion, upon which the initial consultation on the renewed SRS contracts relied, with a jeopardy biological opinion. 4SC ¶¶150, 183-86, 188. In 2004, NMFS issued a biological opinion determining that the OCAP *would not* cause jeopardy to winter-run and spring-run Chinook ("NMFS 2004 OCAP BiOp"). *Pac. Coast*

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[4] The two proposed claims in the 4SC regarding salmonids are brought by existing Plaintiffs NRDC, The Bay Institute ("TBI"), and San Francisco Baykeeper ("Baykeeper"), as well as proposed Plaintiffs, the Winnemem Wintu Tribe ("Winnemem") and Pacific Coast Federation of Fishermen's Associations/Institute for Fisheries Resources ("PCFFA"). Only the existing Plaintiffs, including Friends of the River ("FOR"), bring the proposed claim pertaining to delta smelt.

Fed'n of Fishermen's Ass'ns v. Gutierrez, 606 F. Supp. 2d 1122, 1145-46 (E.D. Cal. 2008). Reclamation subsequently requested consultation with NMFS on the SRS contract renewals. Poole Decl. Ex. 7 (Letter from Rodney McInnis, NOAA Fisheries, to Michael J. Ryan, Reclamation (Jan. 10, 2005)). Relying exclusively on the no-jeopardy finding in the NMFS 2004 OCAP BiOp, NMFS concluded that the SRS contract renewals would not cause jeopardy to the winter-run and spring-run Chinook. *Id.*; 4SC ¶108. After a federal court invalidated the NMFS 2004 OCAP BiOp, *Gutierrez*, 606 F.Supp.2d at 1194, NMFS issued a new biological opinion on June 4, 2009 ("NMFS OCAP BiOp"). LoPresti Decl. Ex. A. In contrast to the previous biological opinion, the NMFS OCAP BiOp determined that the OCAP *would* jeopardize winter-run and spring-run Chinook, and adversely modify their critical habitat. *Id.* The NMFS OCAP BiOp expressly states that it does not analyze the impacts of Reclamation's water contracts and directs Reclamation to separately consult on those contracts. *Id.* at 35. The NMFS OCAP BiOp was amended in 2011, and again in 2014 and 2015.[5]

Even though Reclamation's consultation on the SRS contract renewals relied exclusively on the NMFS 2004 OCAP BiOp, Reclamation did not reinitiate consultation after that biological opinion was invalidated, nor after the NMFS OCAP BiOp was issued, nor after it was amended. 4SC ¶91. Plaintiffs' 4SC thus claims that the NMFS OCAP BiOp and amendments constituted "new information" triggering Reclamation's mandatory duty to reinitiate consultation under 50 C.F.R. §402.16(b). 4SC ¶¶150, 183-86, 188.

The 4SC also alleges that Reclamation violated 50 C.F.R. §402.16 by failing to reinitiate consultation when Reclamation authorized diversions to the SRS Contractors that resulted in massive mortality to the 2014 and 2015 generations of winter-run and spring-run Chinook. 4SC ¶¶151, 183-85, 187-88. Winter-run Chinook inhabit the upper Sacramento River and its tributaries, where the

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[5] The NMFS OCAP BiOp was amended in 2011 to reflect the report of an independent review panel, LoPresti Decl. Ex. B (Letter from R. McInnis, NMFS, to D. Glaser, Reclamation (Apr. 7, 2011)), and in 2014 and 2015 in response to Reclamation's Drought Operations Plan and petitions to waive requirements in the NMFS OCAP BiOp and water quality standards in the Bay-Delta. *Id.* Ex. C (Letter from W. Stelle, NMFS, to D. Murillo, Reclamation (undated, but posted on Apr. 8, 2014), Ex. D (Letter from W. Stelle, NMFS, to D. Murillo, Reclamation and M. Cowin, DWR (Mar. 27, 2015)), Ex. E (Letter from W. Stelle, NMFS, to D. Murillo, Reclamation and M. Cowin, DWR (Jan. 31, 2014)).

flow of cold water throughout the summer allows for successful spawning, egg incubation, and rearing. LoPresti Decl. Ex. A at 79. The construction of Shasta Dam blocked access to almost all the cold-water creeks and rivers that the winter-run Chinook had historically relied upon for spawning and rearing. *Id.* at 79-80. Today, the upper Sacramento River below Keswick Dam, where Reclamation controls the releases from Shasta Reservoir, is the sole remaining spawning and rearing habitat available to the winter-run Chinook. *Id.* Their survival is therefore completely dependent on Reclamation's management of the temperature and flow conditions below Keswick Dam.

Winter-run Chinook are particularly vulnerable during the "temperature management season," which generally lasts from June through October. *Id.* at 79-81, 601; 4SC ¶¶ 66-67. Adult winter-run migrate up the Sacramento River in the winter and spring and hold below Keswick Dam for several months before spawning. *Id.* In these critical months, the winter-run require cold water (between 41 and 56 degrees Fahrenheit) for spawning and development of fertilized eggs. LoPresti Decl. Ex. A at 76-79; 4SC ¶67. Warmer temperatures decrease egg viability and contribute to higher mortality at later life stages. LoPresti Decl. Ex. A at 77-81; *id.* Ex. F at 4; 4SC ¶67. Accordingly, reasonable and prudent alternative ("RPA") Action 1.2.4 in the NMFS OCAP BiOp directs Reclamation to preserve enough cold water in Shasta Reservoir to maintain daily average water temperatures at or below 56 degrees at compliance locations between Balls Ferry and Bend Bridge from approximately May 15 through October 31.[6] LoPresti Decl. Ex. A at 601-03.

In 2014, Reclamation made excessive releases for the purpose of meeting the terms of the SRS contracts, depleting the cold-water reserves in Shasta Reservoir. *Id.* Ex. Q (daily Keswick release summaries for April-May 2014); 4SC ¶73. As a result, temperatures escalated to fatal levels for extended periods, resulting in near-total loss of the winter-run brood year and similar losses to the spring-run brood year. LoPresti Decl. Ex. L at 2 (Letter from M. Rea, NMFS, to R. Milligan, Reclamation (Feb. 27, 2015)); *id.* Ex. G at 11 (State Water Resources Control Board ("SWRCB")

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[6] Although spring-run migration patterns are different than for winter-run, both species rely on cold-water for spawning, egg incubation, and rearing. LoPresti Decl. Ex. A at 77. RPA Action 1.2.4 requires that Reclamation maintain temperatures below 56 degrees from May 15 to September 30 for winter-run, and from October 1 through October 31 for spring-run. *Id.* at 601.

Order approving temporary urgency change petition ("TUCP") (Feb. 3, 2015)); *id.* Ex. K at 15-16 (SWRCB Order approving TUCP (July 3, 2015)); 4SC ¶73. Despite these events, Reclamation did not reinitiate consultation on the SRS contract renewals. *Id.* ¶151.

In a February 2015 review of Reclamation's proposed operations for the 2015 water year, NMFS stated that, "[i]n light of the high mortality (95%) associated with water temperatures observed in 2014 for juvenile winter-run Chinook salmon that spawned in upper Sacramento River, . . . [it is] important to conserve storage in Shasta Reservoir, and specifically the cold water pool, in order to provide for the needs of winter-run [Chinook] eggs and alevin throughout the temperature management season." LoPresti Decl. Ex. L at 2. In spite of NMFS's clear warning, Reclamation again made excessive releases to satisfy the terms of the SRS contracts prior to the start of the temperature management season. *Id.* Ex. R (daily Keswick release summaries for April-May 2015); *id.* Ex. I at 4, 9; 4SC ¶75. In fact, Reclamation *increased* Keswick releases from a total 604,083 acre-feet in April and May of 2014, to a total 677,730 acre-feet in April and May of 2015. *Compare* LoPresti Decl. Ex. Q *with id.* Ex. R. After making these releases, and in spite of prior assurances to the contrary, Reclamation announced that it could not maintain water temperatures of 56 degrees at the Clear Creek compliance point during the temperature management season. *Id.* Ex. M at 2-3 (SWRCB Notice of Public Workshop (June 13, 2015)); Ex. N at Slide 5-6 (SWRCB presentation at Public Workshop (June 24, 2015)); 4SC ¶75. By June 2015, NMFS determined that "the quantity and quality of the cold water pool[] will not provide for suitable winter-run [Chinook] habitat needs throughout their egg and alevin incubation and fry rearing periods" and that these harmful conditions "*could have been largely prevented through upgrades in monitoring and modeling, and reduced Keswick releases in April and May*." LoPresti Decl. Ex. I at 9 (emphasis added); 4SC ¶76.

As NMFS predicted, the daily average water temperature at the Clear Creek compliance point was above 56 degrees for almost the entire 2015 temperature management season. *Id.* Ex. O (daily reports showing temperatures at Clear Creek above 56 degrees on 137 of 153 days between June 1 and

October 31, 2015).[7] Reclamation recently reported that, as of January 14, 2016, juvenile winter-run passage at Red Bluff Diversion Dam ("RBDD")—an indicator of brood year survival—was even lower in 2015 than in 2014. LoPresti Decl. Ex. J at 13-14. Only 2.1% of eggs survived to juveniles and passed the RBDD, placing estimates of winter-run mortality at a stunning 97.9%. *Id.*; 4SC ¶77.

In spite of the fact that Reclamation's operations to benefit the SRS Contractors caused even worse levels of mortality to winter-run Chinook in 2015 than in 2014, Reclamation still has not reinitiated consultation on the SRS contracts. 4SC ¶151. The 4SC alleges that Reclamation violated 50 C.F.R. §402.16(b) by repeatedly failing to reinitiate consultation in light of new information in 2014 and 2015 showing that the implementation of the SRS contracts caused excessive mortality to the winter-run Chinook. 4SC ¶¶151, 183-85, 187-88.

B. Plaintiffs' Section 9 Claim Against Reclamation and the SRS Contractors for Unauthorized Take of Winter-Run and Spring-Run Chinook

The 4SC also alleges that Reclamation's and the SRS Contractors' deliveries and diversions pursuant to the SRS contract renewals resulted in the unlawful take of winter-run and spring-run Chinook in 2014 and 2015, in violation of Section 9 of the ESA, 16 U.S.C. §1538(a)(1)(B). *Id.* ¶¶154-63, 189-93. Section 9 prohibits the "take" of any endangered or threatened species of fish or wildlife. 16 U.S.C. §1538(a)(1)(B), (g). Congress defined take broadly to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* §1532(19). The ESA's implementing regulations further define "harass" to mean "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding, or sheltering," and "harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 C.F.R. §17.3. The Supreme Court has explained that "Congress intended 'take' to apply broadly to cover indirect as well as purposeful

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[7] By comparison, daily average temperatures at Clear Creek in 2014 were above 56 degrees on 87 out of 153 days. LoPresti Decl. Ex. O. In 2013, the daily average temperatures at Clear Creek were *never* above 56 degrees. *Id.*

actions." *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 704 (1995).

A consulting agency may issue an incidental take statement ("ITS") if the agency concludes both that a federal action will not cause jeopardy, or can be carried out pursuant to an RPA without jeopardizing a species, and that the take is incidental to the action and will not cause jeopardy. 16 U.S.C. §1536(b)(4)(A)-(B). "If the terms and conditions of the [ITS] are disregarded and a taking does occur, the action agency or the applicant may be subject to potentially severe civil and criminal penalties under Section 9." *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1239 (9th Cir. 2001).

The 4SC alleges that Reclamation's deliveries to the SRS Contractors, and the SRS Contractors' diversions, depleted the cold water reserves that were critical to the spawning, egg incubation, and rearing of the winter-run and spring-run broods in 2014 and 2015. 4SC ¶¶73-77. The resultant loss in temperature control and massive mortality constitutes "take" within the meaning of Section 9 of the ESA. 16 U.S.C. §1532(19); 50 C.F.R. §17.3. No NMFS ITS provides authorization to take listed Chinook for the purpose of making deliveries to the SRS Contractors. 4SC ¶¶160-63. The NMFS OCAP BiOp's ITS does not provide authority for incidental take caused by water deliveries to the SRS Contractors, which the biological opinion characterizes as "nondiscretionary." LoPresti Decl. Ex. A at 35, 673, 729 (explaining that "any incidental take due to delivery of water to . . . [a] contractor" that Reclamation identifies as "nondiscretionary" is not exempted from the BiOp's Section 9 take prohibition).[8] Similarly, NMFS's 2005 concurrence letter on the SRS contracts, which relied exclusively on the now-superseded NMFS 2004 OCAP BiOp, do not provide take authorization.

[8] Even were Reclamation now to contend that deliveries to the SRS Contractors were "discretionary," Reclamation and the SRS Contractors have failed to comply with the protective measures required by NMFS to minimize or avoid take. For example, in 2014, Reclamation reinitiated consultation with NMFS on the 2009 BiOp to assess the impacts of the joint Drought Operations Plan it submitted with DWR for the operation of the CVP and SWP between April 1, 2014 and November 15, 2014. LoPresti Decl. Ex. C (letter from W. Stelle, NMFS, to D. Murillo, Reclamation (undated, posted on Apr. 8, 2014). NMFS's approval of the Drought Operations Plan was contingent on conserving storage of cold water to control temperatures in the Sacramento River. Specifically, NMFS required that Reclamation "limit[] releases from Keswick Dam to no greater than 3,250 cfs . . . unless necessary to meet nondiscretionary obligations or legal requirements." *Id.* at 4. Reclamation, however, made releases from Keswick Dam between April and early June 2014 far in excess of 3,250 cubic feet per second ("cfs") that depleted the cold water pool behind Shasta Dam and led to the loss of temperature control. *Id.* Ex. Q.

Poole Decl. Ex. 7 ("No additional incidental take is authorized for these contract specific actions beyond the amount or extent of incidental take authorized in the October 22, 2004 [BiOp]."). Because NMFS has not provided authorization for the take caused by Reclamation's deliveries, and the SRS Contractors' diversions, the 4SC alleges that they have violated, and are violating, ESA Section 9 by implementing terms of the SRS contracts that are causing massive mortality to the species and destroying their critical habitat.[9] 4SC ¶¶154-63, 189-93.

C. Plaintiffs' APA Claim Against FWS for Failure to Adequately Consult on the Effects of the SRS and DMC Contracts to Delta Smelt and Its Critical Habitat

Plaintiffs also allege in the 4SC that FWS's 2015 LOC was arbitrary and capricious because it violated Section 7(a)(2) of the ESA and its implementing regulations. 4SC ¶¶132-46, 177-82. When an action agency reinitiates consultation pursuant to the ESA's implementing regulations, 50 C.F.R. §402.16, the consulting agency must conduct a new consultation that is compliant with Section 7(a)(2) of the ESA. *Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1450-51 (9th Cir. 1992); *see also Ridge Top Ranch, LLC v. U.S. Fish & Wildlife Serv.*, No. CIV. S-13-2462, 2014 WL 841229, at *14 (E.D. Cal. Mar. 4, 2014) (agreeing with FWS that "[a]fter an action agency reinitiates consultation . . . the Service is obligated to update the analyses of its biological opinion to conform to all of the requirements of ESA Section 7"). The 4SC alleges that FWS's reinitiated consultation violated Section 7(a)(2) for several reasons.

First, FWS unreasonably relied in the 2015 LOC on the 2008 FWS OCAP BiOp, which failed to consider the full extent of the impacts of the contract renewals. For example, it is well established that a consulting agency must consider the "*entire* agency action" in a consultation that is "coextensive" with the action at issue. *Conner v. Burford*, 848 F.2d 1441, 1453, 1458 (9th Cir. 1988). In the 2015 LOC, FWS relied expressly and exclusively on the 2008 FWS OCAP BiOp, which does not include any analysis of future impacts beyond 2030.[10] The SRS contracts, however, do not expire

[9] On August 10, 2015, pursuant to the notice requirements of Section 11(g) of the ESA, 16 U.S.C. §1540(g), Plaintiffs and proposed Plaintiffs sent a 60-day notice of intent to sue Reclamation and the SRS Contractors that are parties to this case for the salmonid-related claims in the 4SC. 4SC Ex. 6.

[10] The 2008 FWS OCAP BiOp repeatedly states that its analysis does not extend beyond 2030. *See, e.g.*, LoPresti Decl. Ex. V at 2, 16-17, 78, 85, 204-08. Indeed, the 2008 FWS OCAP BiOp makes

(Cont'd on next page)

until 2045. *See, e.g.*, SAR 2703 (Contract Between the U.S. and Glenn-Colusa Irr. Dist. (Feb. 28, 2005)). Thus, by relying exclusively on the 2008 FWS OCAP BiOp, FWS failed to consider the effects of the final fifteen years of the SRS contracts. 4SC ¶¶134, 180. Further, as the Ninth Circuit en banc panel recognized, the 2008 FWS OCAP BiOp did not consider the effects of other key terms in the contract renewals, such as the pricing, timing, and water conservation terms.[11] *Jewell*, 749 F3d at 782; 4SC ¶¶135, 179.

FWS's exclusive reliance on the 2008 FWS OCAP BiOp was also unreasonable because the 2008 FWS OCAP BiOp and RPA relied on the assumption that Delta flow requirements and export limits in D-1641,[12] which are necessary to protect the delta smelt at key points in the spawning, rearing and mitigation phases of its life cycle, would remain intact throughout the consultation period covered by the 2008 FWS OCAP BiOp. When Reclamation requested reinitiation of consultation with FWS on July 30, 2015, it had already sought and received approval from the SWRCB in both 2014 and 2015 to waive these requirements. It was therefore unreasonable for FWS to rely in the 2015 LOC on the 2008 FWS OCAP BiOp because the assumptions underlying the analysis in the 2008 FWS OCAP BiOp are no longer valid. 4SC ¶¶137, 179.

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clear that the only studies conducted on future conditions assume 2030 levels of development and demand. *See id.* at 207-08. Further, the studies in Reclamation's 2008 BA, upon which FWS relied in completing the 2008 FWS OCAP BiOp, make clear that the analysis only extends to the 2030 "consultation horizon." *See, e.g.*, *id.* Ex. W at 2-1 – 2-2, 9-1, 9-33 – 9-36, 9-53, R-2, R-4, R-13, R-15, R-19, R-32 – R-33, R-47, D-4, D-31, D-46 – D-47.

[11] A biological opinion must include a "detailed discussion" of the direct and indirect effects of the action. 50 C.F.R. §§402.02, 402.14(h)(2). Notably, there is not a single mention – let alone a "detailed discussion" – of the contract renewals in the 77-page section of the 2008 FWS OCAP BiOp devoted to the "Effects of the Proposed Action." LoPresti Decl. Ex. V at 202-79.

[12] The flow requirements and export limits that were waived are established in the water quality standards of the San Francisco Bay/Sacramento-San Joaquin Delta Estuary Water Quality Control Plan ("Bay-Delta Plan"). In 1999, the SWRCB adopted Water Rights Decision 1641 ("D-1641"), which the SWRCB later revised in 2000. D-1641 imposes terms and conditions on Reclamation's permits to operate the CVP. Amongst other conditions, D-1641 requires that Reclamation operate the CVP in a manner that implements water quality standards in the Bay-Delta Plan, including its flow requirements and export limits. D-1641 is a baseline operating assumption in the 2008 FWS OCAP BiOp and integral to its environmental baseline. LoPresti Decl. Ex. V at 21-25.

Further, the 2015 LOC does not utilize the best available scientific data, as required by ESA Section 7(a)(2). 16 U.S.C. §1536(a)(2). When the Court stayed this litigation on June 15, 2015, it did so to "allow the agencies to revisit whether approval of the Contracts comports with the ESA *in light of the most up-to-date information*." Doc. 979 at 12 (emphasis added). The 2015 LOC, however, does not include, nor even reference, any analysis of the impacts of the contracts that post-dates the seven-year-old 2008 FWS OCAP BiOp. *See* Doc. 993-1. For instance, FWS did not analyze recent data showing that delta smelt populations have plummeted to record-low levels during each of the past two years, and that the condition of critical habitat in the Delta has similarly declined.[13] 4SC ¶¶60-63, 141. Further, FWS failed to consider the hydrological conditions and competing demands that gave rise to the repeated waivers in 2014 and 2015 of the flow requirements and export limits in D-1641, as well as recent science demonstrating the harmful effects associated with those waivers. *Id.* ¶¶57-59, 142. The 4SC thus alleges that FWS failed to use the best scientific data available and to "update the analyses." *Ridge Top Ranch*, 2014 WL 841229, at *14; 4SC ¶¶138-43, 181.

Finally, FWS impermissibly relied in the 2015 LOC on unspecified "future consultations" to analyze and address the impacts of the SRS contract terms on delta smelt. Doc. 993-1 at 5. FWS noted that it may "require greater certainty" that Reclamation can reduce the quantity of water in the SRS contracts to meet the survival and recovery needs of the delta smelt. *Id.* The ESA does not permit consulting agencies to postpone determinations regarding the effects of an action to a later date. *See Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 974 (9th Cir. 2003) (explaining that agencies must finish consultation "*before* engaging in a discretionary action, which may affect listed species" (emphasis added)). Relatedly, FWS unreasonably assumed that Reclamation could alter the quantity of water available to the SRS Contractors if necessary to comply with the ESA, even though Reclamation informed FWS in the information it submitted with its

[13] Amongst FWS's failures to consider the best available scientific data in the 2015 LOC, FWS did not update its analyses to include Fall Midwater Trawl ("FMWT") survey data showing that the FMWT index hit record lows in 2014 and 2015. 4SC ¶61; LoPresti Decl. Ex. J at 14-15; Ex. S at 3. Notably, FWS's failure to consider up-to-date FMWT survey data showing then-record-low abundance levels in 2004 was one of the bases for this Court's decision to invalidate the FWS 2005 OCAP BiOp. *Kempthorne*, 506 F.Supp.2d at 362-66.

request for reinitiation that it has *no discretion* to alter the quantities of water available to the SRS Contractors. *Compare* Doc. 993-1 at 5 *with* Poole Decl. Ex. 2B at 10. The 4SC thus alleges that FWS impermissibly postponed a full analysis of the impacts of the SRS contracts and unreasonably assumed that Reclamation could take an action to address the decline of delta smelt that Reclamation itself claims it was unable to take. 4SC ¶¶144-46, 182.

ARGUMENT

I. Legal Standard

Federal Rule of Civil Procedure ("Rule") 15(d) provides that, "On motion and reasonable notice, the court may, on just terms permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Supplementation implements "one of the basic policies of the [Federal Rules of Civil Procedure] . . . that a party should be given every opportunity to join in one lawsuit all grievances against another party regardless of when they arose." Wright & Miller, 6A Fed. Prac. & Proc. §1506 (3d ed.). The courts have generally allowed supplementation when "a matter is still pending, and final judgment has not yet been entered." *W. Watersheds Project v. U.S. Forest Serv.*, CV-05-189, 2009 WL 3151121, at *2 (D. Idaho 2009) (collecting cases).

Courts favor supplementation when it advances judicial economy by allowing for disposition of the "entire controversy between the parties . . . in one action." *Planned Parenthood of S. Ariz. v. Neely*, 130 F.3d 400, 402 (9th Cir. 1997). "[T]he matters stated in a supplemental complaint should have some relation to the claim set forth in the original pleading," but they do not need to "arise out of the same transaction or occurrence nor involve common questions of law or fact." *Keith v. Volpe*, 858 F.2d 467, 474 (9th Cir. 1988) (internal quotations omitted). When a supplemental complaint "raises similar legal issues to those already before the court," leave to supplement is generally warranted to "avert[] a separate, redundant lawsuit." *Fund For Animals v. Hall*, 246 F.R.D. 53, 55 (D.D.C. 2007). Relatedly, when a court has developed familiarity with the statutes, regulations, legal theories, scientific considerations, and facts of a case, supplementation to add like claims is favored as a means to judicial economy. *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng's*, 243 F.R.D. 253, 257

(S.D. W.Va. 2007); *San Luis & Delta-Mendota Water Auth. v. U.S. Dep't of Interior*, 236 F.R.D. 491, 499 (E.D. Cal. 2006) ("*SLDMWA*").

In addition to considerations of judicial economy, courts apply the same standard as for motions to amend under Rule 15(a)(2). *Lyon v. U.S. Immigration & Customs Enforcement*, 308 F.R.D. 203, 214 (N.D. Cal. 2015). Rule 15(a)(2) provides that a "court should freely give leave [to amend] when justice so requires." This policy is to be applied with "extreme liberality," *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001), and the "liberality . . . is not dependent on whether the amendment will add causes of action or parties," *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987). Given this generous rule, "there exists a *presumption* under Rule 15(a) in favor of granting leave to amend," *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003), and all inferences should generally be drawn in favor of amendment, *Griggs v. Pace Am. Group, Inc.*, 170 F.3d 877, 880 (9th Cir. 1999). The burden is on the opposing party to show that amendment is inappropriate. *DCD Programs*, 833 F.2d at 187. Courts will consider whether: (1) the plaintiff unjustly delayed or is acting in bad faith; (2) amendment would cause undue prejudice; (3) amendment would be futile; and (4) the plaintiff repeatedly failed to properly amend.[14] *Lyon*, 308 F.R.D. at 214 (citing *Foman v. Davis*, 371 U.S. 178, 182-83 S.Ct. 227 (1962)). Among these factors, prejudice to the opposing party carries the most weight. *Eminence Capital*, 316 F.3d at 1052.

II. Leave to File the 4SC Should Be Granted Because It Will Promote Judicial Economy and None of the Factors Precluding Leave Are Present

A. Leave to File the 4SC Will Promote Judicial Economy

Supplementation will promote judicial economy because it will facilitate a complete adjudication of the "entire controversy" regarding the contract renewals, *Neely*, 130 F.3d at 402, rather than requiring "a separate, redundant lawsuit," *Fund For Animals*, 246 F.R.D. at 55.

It would promote judicial economy for the Court to consider Plaintiffs' proposed claim that

[14] Because the events giving rise to the 4SC arose after the filing of the Third Supplemental Complaint, the factor addressing the "failure of previous amendments" is not at issue.

FWS's 2015 LOC is invalid because it is directly related to the existing claim against Reclamation for failing to insure that the contract renewals do not jeopardize the delta smelt or adversely modify its critical habitat. Both claims, the existing claim against Reclamation and the proposed claim against FWS, hinge on the same fundamental question: whether there has been an ESA-compliant consultation on the SRS and DMC contract renewals. Resolution of both claims is relevant to the ultimate validity of the contract renewals. Further, supplementation benefits efficiency because the statutes, regulations, legal theories, scientific considerations, and facts of Plaintiffs' proposed claims against FWS are similar to those in Plaintiffs' existing claim. *See id.*; *Ohio Valley*, 243 F.R.D. at 257; *SLDMWA*, 236 F.R.D. at 499.

Similarly, Plaintiffs' proposed claim against Reclamation for failure to reinitiate consultation regarding the impacts of the SRS contract renewals on listed salmonid species would promote judicial economy because it raises legal issues already before the Court, which are "closely and directly related to the issues decided in earlier stages of this litigation." *SLDMWA*, 236 F.R.D. at 498. In its June 15, 2015 order, the Court stayed this litigation to provide Reclamation an opportunity to reinitiate consultation with FWS on the SRS and DMC contract renewals. Doc. 979 at 20-21. Reclamation argued, and the Court agreed, that the invalidation of FWS's no-jeopardy 2005 OCAP BiOp, upon which the concurrence letters for the contract renewals exclusively relied, and the subsequent release of the 2008 FWS OCAP BiOp, which found jeopardy, warranted reinitiation of consultation under 50 C.F.R. §402.16. *Id.* at 12, 16; Doc. 955 at 7, 12-13 (Fed. Defs.' Mem. of P. & A. in Supp. of Mot. to Stay ("Fed. Defs.' MTS Br.")); Doc. 970 at 14 (Fed. Defs.' Reply Br. in Supp. of Mot. to Stay). Plaintiffs continue to believe that the Court should assess whether a valid consultation was completed *prior* to the execution of the contract renewals, rather than allowing for post hoc compliance with Section 7 by reinitiating consultation. *See Jewell*, 749 F.3d at 785. Nonetheless, just as the Court found that reinitiation of consultation with FWS was warranted with respect to the contracts' impacts on delta smelt, reinitiation of consultation with NMFS is also necessary. The FWS and NMFS histories of consultation are analogous. The invalidation of NMFS's no-jeopardy 2004 OCAP BiOp, upon which the concurrence letters for the SRS contract renewals exclusively relied, and the subsequent release of the NMFS OCAP BiOp in 2009, which found jeopardy, requires reinitiation of

consultation with NMFS on the SRS contract renewals under 50 C.F.R. §402.16. Given the virtually identical analysis, it would promote judicial economy to address Plaintiffs' new reinitiation claim as part of the existing lawsuit, rather than requiring separate litigation.

Additionally, the validity of a federal action, such as the SRS contract renewals, depends on Reclamation's compliance with ESA section 7 for *both* salmonids and delta smelt. 16 U.S.C. §1536(a)(2). Even if the Court finds that Reclamation's consultation with FWS on delta smelt passes legal muster, the SRS contract renewals are not ESA-compliant unless and until there has been adequate consultation with NMFS on the impacts to salmonid species as well. Thus, it serves judicial economy to resolve the "entire controversy" over the renewals in one case that addresses both salmonids and smelt, rather than prolonging final resolution by requiring litigation of a second action. *Neely*, 130 F.3d at 402; *see also* Wright & Miller, 6A Fed. Prac. & Proc. §1506 ("[T]he usual effect of denying leave to file a supplemental pleading because it states a new 'cause of action' is to force plaintiff to institute another action and move for consolidation under Rule 42(a) in order to litigate both claims in the same suit, a wasteful and inefficient result.").

The addition of Plaintiffs' section 9 claim would serve judicial economy because it is closely related to the overarching controversy regarding the SRS contract renewals. Reclamation's loss of temperature control occurred in 2014 and 2015 largely, if not entirely, because it made excessive releases to satisfy the SRS contract renewals that are the subject of Plaintiffs' existing claims. It would be a waste of resources to separately litigate section 7 and 9 claims that relate to the same facts and science regarding the SRS contract renewals. *See SLDMWA*, 236 F.R.D. at 499. Further, if the Court rules that Reclamation and the SRS Contractors have committed unlawful take, Reclamation would have to consult with NMFS on the SRS contract renewals to secure take authority pursuant to an ITS. *See* 16 U.S.C. §1536(b)(4) (establishing process for acquiring ITS); 50 C.F.R. §402.14(*i*) (same). Thus, as with all the existing and proposed claims, a ruling in Plaintiffs' favor would lead to the same result – a new consultation on the SRS contracts. It is most efficient to resolve the "entire controversy" regarding consultation on the SRS contracts together, rather than requiring additional, redundant litigation. *Neely*, 130 F.3d at 402.

B. Leave Should Be Granted Because None of the Factors That Would Weigh Against Supplementation Is Present

1. There is no unjust delay or bad faith

Plaintiffs have not unjustly delayed seeking to supplement their complaint and have not acted in bad faith. Although courts may consider undue delay when evaluating a motion to amend or supplement, "undue delay by itself . . . is insufficient to justify denying a motion to amend." *Bowles v. Reade*, 198 F.3d 752, 758 (9th Cir. 1999). There must also be a finding as to undue prejudice, bad faith, or futility to justify denial. *Yates v. Auto City 76*, 299 F.R.D. 611, 614 (N.D. Cal. 2013). Bad faith exists if the moving party has an ulterior, wrongful motive in seeking to amend. *See, e.g.*, *Fresno Unified Sch. Dist. v. K.U. ex rel. A.D.U.*, 980 F.Supp.2d 1160, 1177 (E.D. Cal. 2013) (finding bad faith where the "sole purpose" for seeking amendment was to "delay resolution of an issue on which [the moving party] knows she is unlikely to prevail").

Plaintiffs aim to supplement their complaint to add an APA claim against FWS because the 2015 LOC, which was issued less than two months prior to this filing, is fundamentally flawed. Doc. 993-1. Plaintiffs have moved expeditiously to identify the numerous deficiencies in the 2015 LOC, and have not delayed in filing this motion for leave to add a claim that challenges its validity.

Plaintiffs have not previously alleged that Reclamation failed to reinitiate consultation with NMFS on the SRS contracts because Plaintiffs' position has been (and continues to be) that Reclamation improperly consulted on the original execution of the contract renewals. *See, e.g.*, Doc. 965 (Pls.' Opp. to Mtn. to Stay Proceedings) at 20-22. Plaintiffs have long argued that the contract renewals should be set aside and renegotiated to include species-protective terms. *Id.* at 36. Before a renegotiated contract could go into effect, Reclamation would be required to consult with both FWS and NMFS. 16 U.S.C. §1536(a)(2). But the Court's June 15, 2015 stay order changed the course of the litigation. Given the Court's decision to allow Reclamation to reinitiate consultation while the contract renewals remain in place, Plaintiffs contend there must be reinitiation with both FWS and NMFS to assess impacts on both delta smelt and listed salmonids.

In addition to recent developments in this litigation, Plaintiffs seek leave to file the 4SC now because of Reclamation's recent and repeated failures to maintain temperature control in the Sacramento River in order to satisfy the SRS contracts. As described *supra*, Background section

II.A.2, after Reclamation's excessive releases and loss of temperature control caused massive mortality to winter-run and spring-run Chinook in 2014, Reclamation represented that it would avoid a similar result in 2015. The most recent winter-run mortality estimates for 2015 establish that Reclamation has utterly failed to do so. 4SC ¶77; LoPresti Decl. Ex. J at 13-14. The loss of a third consecutive generation in 2016 would be devastating to the survival and recovery of winter-run and spring-run Chinook, which generally live only three years. Plaintiffs now seek to avoid a third year of mortality by challenging both Reclamation's and the SRS Contractors' illegal take in violation of Section 9 and Reclamation's failure to reinitiate consultation with NMFS on the SRS contracts.

2. Filing the 4SC would not cause undue prejudice to Defendants

Plaintiffs' proposed supplemental complaint will not cause undue prejudice to Defendants. "While prejudice to the non-movant is a valid reason for denying leave to amend, such prejudice must in fact be 'undue.'" *Dove v. Wash. Metro. Area Transit Auth.*, 221 F.R.D. 246, 248 (D.D.C. 2004); *see also Abels v. JBC Legal Grp., P.C.*, 229 F.R.D. 152, 158 (N.D. Cal. 2005) ("To deny leave to amend, the prejudice must be substantial."). "Undue prejudice is not mere harm to the non-movant but a denial of the opportunity to present facts or evidence which would have been offered had the amendment been timely." *Dove*, 221 F.R.D. at 248. The Court will not, by granting leave to file the 4SC, deny Defendants an opportunity to present evidence or facts that would have been available had the proposed new claims been filed earlier.

Courts have sometimes found undue prejudice when a motion to amend or supplement is filed in the advanced stages of litigation. *See, e.g.*, *Jacobson v. Rose*, 592 F.2d 515 (9th Cir. 1978). Although eight years have passed since the filing of the Third Supplemental Complaint, most of the litigation to date has centered on jurisdictional and procedural issues. When Plaintiffs moved for summary judgment in 2008, this Court's predecessor ruled that Plaintiffs lacked standing on claims involving the DMC contracts and that Reclamation did not have sufficient discretion to trigger its obligations under the ESA as to the SRS contracts. Doc. 761 & 834. Those rulings were not corrected until the Ninth Circuit's en banc opinion was filed in April 2014, *Jewell*, 749 F.3d 776, and the mandate was issued in November 2014, *NRDC v. Salazar*, 09-17661 (Nov. 5, 2014) (App. Doc. No. 242). After the parties unsuccessfully attempted to settle, *see* Doc. 944, Plaintiffs requested that

the Court set a briefing schedule for motions for summary judgment, Doc. 947 at 5-8. The Court instead stayed the litigation until December 15, 2015 to allow Reclamation to reinitiate consultation. Doc. 979. Thus, since 2008, the litigation has not progressed to a more advanced stage of litigation.

There is also no undue prejudice because the existing and proposed claims involve similar theories and facts. The proposed APA claim against FWS is merely an extension of the existing claims. Reclamation received the Court's leave to reinitiate consultation on the contract renewals, Doc. 979, and Plaintiffs now challenge the product of that reinitiated consultation. Plaintiffs' failure-to-reinitiate claim asks the Court to apply the same reasoning regarding reinitiation of consultation with NMFS as the Federal Defendants applied when they asked the Court to stay the litigation. Further, the facts that form the core of Defendants' Section 7 arguments are also key to the proposed Section 9 claim. Thus, no defendant will be burdened by extensive new legal or factual research. Indeed, when the "facts concerning [supplemental claims] are within defendants' knowledge," as they are here, there is "little prejudice to defendants by the addition of th[e] claim." *Concerned Area Residents for the Env't v. Southview Farm*, 834 F.Supp. 1410, 1413 (W.D.N.Y. 1993); *see also LaSalvia v. United Dairymen of Ariz.*, 804 F.2d 1113, 1119 (9th Cir. 1986) (reversing district court's denial of Plaintiff's motion to supplement complaint because "most of the information on the added claim would be available in [Defendant's] own files.").

3. Plaintiffs are likely to succeed on the new claims asserted in the 4SC

Although futility of amendment is among the factors a court considers in determining whether to allow supplementation of a complaint, *Lyon*, 308 F.R.D. at 214, "[c]ourts rarely deny a motion for leave to amend for reason of futility." *Hynix Semiconductor Inc. v. Toshiba Corp.*, No. C-04-4708, 2006 WL 3093812, at *2 (N.D. Cal. Oct. 31, 2006). "[The] proper test to be applied when determining the legal sufficiency of a proposed amendment is identical to the one used when considering the sufficiency of a pleading challenged under Rule 12(b)(6)." *Asarco LLC v. Shore Terminals LLC*, No. C 11-01384, 2012 WL 440519, at * 2 (N.D. Cal. Feb. 10, 2012) (quoting *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). "A claim has

facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Here, Plaintiffs' proposed 4SC states additional claims for relief that would easily survive a motion to dismiss.

a. Plaintiffs' APA claim

As outlined *supra*, Background section II.C, Plaintiffs are likely to succeed on their proposed claim that FWS violated the APA, 5 U.S.C. §706(2), by issuing a letter of concurrence that violated Section 7(a)(2) of the ESA and its implementing regulations. 4SC ¶¶177-82.

First, FWS's exclusive reliance in the 2015 LOC on the 2008 FWS OCAP BiOp was arbitrary and capricious for several reasons, including: (1) FWS failed to consult on the "*entire* agency action," *see Conner*, 848 F.2d at 1453, because, even though the SRS contract renewals do not expire until 2045, the analysis in the 2008 FWS OCAP BiOp does not extend beyond 2030; (2) the 2008 FWS OCAP BiOp did not include analysis of the specific terms of the contract renewals, including pricing and timing; and (3) the 2008 FWS OCAP BiOp relied on the assumption that species-protective requirements in D-1641 would remain in place, even though repeated waivers of those requirements in 2014 and 2015 renders that assumption invalid. 4SC ¶¶132-37. Second, FWS failed to use the best available scientific data and update its analysis because it did not analyze recent declines in the delta smelt population, and did not consider hydrological changes and competing demands that gave rise to the repeated waivers of D-1641 requirements, nor recent scientific data on the impacts of those waivers. 16 U.S.C. §1536(a)(2); *Ridge Top Ranch*, 2014 WL 841229, at *14; 4SC ¶¶138-43. Finally, FWS impermissibly postponed a full analysis of the contracts' impacts on delta smelt and unreasonably assumed that Reclamation could modify annual deliveries under the SRS contracts, even though Reclamation explicitly stated in the information it submitted to FWS with its request for reinitiation that it has no discretion to "alter the quantities . . . of SRS diversions." *Compare* Doc. 993-1 at 5 *with* Poole Decl. Ex. 2B at 10; 4SC ¶¶144-46.

b. Plaintiffs' failure-to-reinitiate claim

As outlined *supra*, Background section II.A.1-2, Plaintiffs are likely to succeed on their proposed claim that Reclamation violated Section 7(a)(2) and the ESA's implementing regulations, when it failed to reinitiate consultation with NMFS on the effects of the SRS contract renewals to

winter-run and spring-run Chinook. 4SC ¶¶183-88. A federal agency must reinitiate consultation when it retains "Federal involvement or control over the action," and one of several triggering events occurs including that "new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered." 50 C.F.R. §402.16(b).

There can be no dispute that Reclamation retains the requisite "discretionary federal involvement or control" over the contracts to trigger reinitiation. *Id.* §402.16. The *Jewell* en banc panel in this litigation unanimously ruled that Reclamation retains discretion to take species-protective measures with regards to the SRS contract renewals. *Jewell*, 749 F.3d at 784-85. Further, this Court has granted Reclamation's motion to stay proceedings to allow it to reinitiate consultation pursuant to 50 C.F.R. §402.16 to evaluate the impacts of the SRS renewals on the delta smelt, something the Court could not have done if Reclamation did not have the requisite discretion under that regulation. Doc. 979. Finally, in spite of Reclamation's assertions in the reinitiation package it submitted to FWS that it does not have discretion to change the timing of its deliveries to the SRS Contractors, it has repeatedly done so. 4SC ¶152. In fact, as recently as October 26, 2015, Reclamation authorized temporary changes to the timing of deliveries to the SRS Contractors from the terms prescribed in the SRS contracts. Poole Decl. Ex. 5 at 1.

Reclamation also has extensive "Federal involvement" in the contract renewals' implementation. 4SC ¶153. Under the terms of the SRS contracts, Reclamation is not a passive participant, simply operating around diversions made by the SRS Contractors. Instead, the contract terms obligate Reclamation to deliver specified quantities of water to the Contractors' various diversion facilities throughout the year. *See, e.g.*, SAR 2695-2737. Further, the contracts themselves require that Reclamation implement them in compliance with the ESA. *Id.*

The 4SC describes events that clearly triggered Reclamation's mandatory duty to reinitiate consultation with NMFS. 4SC ¶¶73-77, 107-13. First, when NMFS issued its 2009 BiOp and subsequent amendments, which found that the OCAP would jeopardize listed salmonid species, it superseded the no-jeopardy NMFS 2004 BiOp, which serves as the sole basis for NMFS's existing consultation on the SRS contracts. *Id.* ¶¶107-13, 150. Second, the near-total mortality to two consecutive brood years of winter-run and spring-run Chinook caused by excessive deliveries to the

SRS Contractors in 2014 and 2015 triggered mandatory reinitiation. 50 C.F.R. §402.16; 4SC ¶¶73-77, 151. The NMFS OCAP BiOp and amendments, as well as the data showing massive mortality of winter-run Chinook in both 2014 and 2015, constitute "new information" requiring Reclamation to reinitiate consultation. 50 C.F.R. §402.16(b).

c. Plaintiffs' Section 9 claim

As outlined *supra*, Background section II.B, Plaintiffs are also likely to succeed on their proposed claim that Reclamation's deliveries, and the SRS Contractors' diversions, caused massive unauthorized take in 2014 and 2015 in violation of Section 9. 16 U.S.C. §1538(a)(1)(B), (g); 4SC ¶¶189-93. These deliveries and diversions depleted the cold water reserve in Shasta Reservoir that was critical to the spawning, egg incubation, and rearing of the winter-run and spring-run broods. 4SC ¶¶73-77. As a result, Reclamation failed in its duty to control temperatures in the critical habitat for these species, causing near-total loss of the 2014 and 2015 generations of winter-run Chinook, and similar losses to spring-run Chinook. *Id.* ¶¶73-77, 159.

Reclamation and the SRS Contractors caused take of winter-run and spring-run Chinook in violation of Section 9, 16 U.S.C. §1538(a)(1)(B), (g), by "kill[ing]," "harm[ing]," and "harass[ing]" the species, *Id.* §1532(19). Not only did the deliveries and diversions directly kill the species, they were "intentional or negligent act[s] or omission[s] which create[] the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding, or sheltering." 50 C.F.R. §17.3. Further, they caused "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." *Id.* As explained *supra*, Background section II.B, neither Reclamation nor the SRS Contractors had authorization to take any winter-run or spring-run Chinook for the purpose of delivering or diverting water pursuant to the SRS contracts. *See also* 4SC ¶¶160-63.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court grant leave to file the proposed Fourth Supplemental Complaint.

Respectfully submitted,

DATED: February 3, 2016

By: */s/ Barbara Jane Chisholm*
Barbara Jane Chisholm

KATHERINE POOLE (SBN 195010)
DOUGLAS ANDREW OBEGI (SBN 246127)
NATURAL RESOURCES DEFENSE COUNCIL
111 Sutter Street, 20th Floor
San Francisco, CA 94104
Telephone: (415) 875-6100
Facsimile: (415) 875-6161
Attorneys for Plaintiff NRDC

HAMILTON CANDEE (SBN 111376)
BARBARA JANE CHISHOLM (SBN 224656)
TONY LOPRESTI (SBN 289269)
ALTSHULER BERZON LLP
177 Post St., Suite 300
San Francisco, CA 94108
Telephone: (415) 421-7151
Facsimile: (415) 362-8064
Attorneys for Plaintiff NRDC

TRENT W. ORR (SBN 77656)
EARTHJUSTICE
50 California St. Suite 500
San Francisco, CA 94111
Telephone: (415) 217-2000
Facsimile: (415) 217-2040
Attorneys for Plaintiffs and proposed Plaintiffs

PROOF OF SERVICE

CASE: *NRDC v. Jewell, et al.*

CASE NO: U.S. Dist. Ct., E.D. Cal., Case No. 1:05-cv-01207 LJO-EPG

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. I hereby certify that on February 3, 2016, I electronically filed the following with the Clerk of the Court for the United States District Court for the Eastern District by using the CM/ECF system:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' AMENDED MOTION FOR L EAVE TO FILE A FOURTH SUPPLEMENTAL COMPLAINT

All participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this February 3, 2016, at San Francisco, California.

/s/ *Barbara Jane Chisholm*
Barbara Jane Chisholm